BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	**MM Docket 92-266**
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

INITIAL COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

THE COALITION OF MUNICIPAL AND
OTHER LOCAL GOVERNMENTAL
FRANCHISING AUTHORITIES

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TABLE OF CONTENTS

SUMMARY OF INITIAL COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Pursuant to Rule 1.49(c) of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure1/, the Coalition of Municipal and Other Local Governmental Franchising Authorities ("Coalition") submits this summary of its initial comments.

A. SCOPE OF THE FCC'S JURISDICTION OVER BASIC SERVICE TIER RATES

The FCC's jurisdiction over regulation of basic service tier rates is not limited to situations where (1) the local franchising authority applies for, but is denied, certification to regulate basic service tier rates, or (2) the local franchising authority's certification is subsequently revoked by the FCC. The FCC must instead find that its jurisdiction over regulation of basic service tier rates includes not only these two situations, but also situations where the local franchising authority chooses not to apply for certification.

The FCC should therefore permit local franchising authorities to state that they do not intend to regulate cable operators subject to their jurisdiction, and to request that the FCC assert jurisdiction over basic service tier rates in their franchise areas.

1/ 47 C.F.R. § 1.49(c).

B. REGULATION OF EXISTING AND FUTURE RATES

The FCC should find that the Cable Act authorizes regulation of both existing and future rates. The FCC is obligated to establish a regulatory scheme which provides a means for reducing existing excessive rates and for preventing future excessive rates. To enforce this mandate, local franchising authorities must have the authority to order refunds. The Coalition proposes procedures for the review of current rates and future rate increase applications.

Any rate or proposed rate which is challenged by consumers, franchising authorities, etc., on grounds that the rate is unreasonable should be made subject to refund pending review of the rates by the applicable franchising authority.

The Commission should not permit cable systems automatically to pass costs through to customers without prior regulatory review.

Franchising authorities have the authority under the Cable Act to set rates for the basic tier, not just to reject unreasonable rates.

C. DETERMINING WHETHER EFFECTIVE COMPETITION EXISTS

The determination of whether a cable system is subject to effective competition should be made in the first instance by the local franchising authority, rather than the FCC.

D. JOINT CERTIFICATION AND JOINT REGULATORY JURISDICTION

The FCC should permit, but not require, local franchising authorities to file for joint certification in order to permit joint regulation where multiple franchise areas are served by the same cable system. The FCC may not require joint regulation where local franchising authorities choose to regulate individually.

Joint certification should not be required as part of the initial certification process, although the FCC should permit initial filings to be made jointly at the option of the local franchising authority. The FCC should establish simple procedures whereby local franchising authorities that previously have been certified individually may notify the FCC that they will operate jointly in the future.

E. BENCHMARK RATES VS. COST OF SERVICE REGULATION

Benchmark rates alone will not assure that cable rates are reasonable. A benchmark approach to rate regulation should therefore be adopted only if the FCC permits both the cable operator and the franchising authority to deviate from the benchmark in order to justify/challenge rates on the basis of cost-of-service regulation. As suggested by the FCC, a cable operator should be able to seek a cost-of-service review where it feels that its actual costs warrant a rate above the benchmark rate, but only if franchising authorities are also permitted to deviate from the benchmark

rate in order to reduce the rates of cable operators whose actual costs warrant a rate below the benchmark rate.

F. ESTABLISHING AN APPROPRIATE BENCHMARK RATE

The FCC's suggestion to use "the average of rates currently charged by systems facing effective competition" as a benchmark is infeasible, since there appear to be inadequate representative areas where such effective competition exists.

The FCC's suggestion to base a benchmark on rates charged before the deregulation of the cable industry is not a reasonable way for the FCC to proceed, given the changes in the cable industry since 1986, and the fact that such price data will be stale.

The FCC's suggestion to "use data for all cable systems operating in 1992 to develop a benchmark from the average per channel rate for their lowest tier" is unacceptable, because it assumes that existing rates are reasonable, whereas existing rates are in many instances too high.

Cable systems with rates below a benchmark rate must not be permitted to increase their rates to the benchmark, absent a showing to the franchising authority of special circumstances.

G. NEED FOR FCC TO COLLECT CERTAIN DATA FROM CABLE OPERATORS

The FCC should require that cable operators submit annual reports to the FCC and franchising authorities

containing cost, accounting, and other related data to be used to establish meaningful benchmarks and to implement cost-of-service alternatives. The FCC should require cable systems to keep their accounting records according to generally accepted accounting principles (GAAP).

H. SMALL SYSTEM BURDENS

Small systems should not be exempted from rate regulation. The Coalition suggests that the basic procedures it outlines in its comments for review of initial and future rates for the basic service tier should apply to small systems as well. The administrative and cost burdens on small systems may be reduced provided that franchising authorities are provided with all information necessary to the establishment of reasonable rates.

To the extent the FCC nonetheless adopts any small system exemptions, such exemptions should apply only to independently-owned, stand-alone systems.

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INITIAL COMMENTS OF
THE COALITION OF MUNICIPAL AND OTHER
LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Pursuant to the Notice of Proposed Rulemaking issued December 24, 1992,1/ the Coalition of Municipal and other Local Governmental Franchising Authorities ("Coalition") submits these initial comments.2/

INTRODUCTION

The telecommunications industry has grown in recent years from a mere source of entertainment to a virtual staple of modern American life. Particularly in small town

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1/ Implementation of Sections of the Cable Television Protection and Competition Act of 1992--Rate Regulation, MM Docket No. 92-266, Notice of Proposed Rulemaking, slip issued December 24, 1992 ("NPRM").

2/ The Coalition is an unaffiliated group of 19 municipal governments and municipal membership organizations representing 76 municipal goverments in 14 states which are, or may be interested, in establishing themselves or their members as franchising authorities, or in establishing municipally-owned and operated cable television systems. The Coalition comprises the municipalities identified in Appendix A.

America, cable news and public service programming have grown to equal if not surpass traditional sources of news and information. The growing popularity of and need for basic cable television programming, however, has barely kept pace with the price gouging and other abusive practices of monopolistic cable system operators since the mid 1980's, practices which in many cases threaten the economic viability of basic service tier programming for many Americans.

The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act")3/ is intended to curb those abuses and to ensure that basic service tier programming is reasonably priced. The Cable Act looks to local communities in the first instance as the primary source of regulatory control over basic service tier rates. The Cable Act has as a subsidiary purpose the reduction or minimization of administrative burdens on cable system operators, franchising authorities, and consumers. The Federal Communications Commission ("FCC" or "Commission") is charged with the duty of promulgating regulations which ensure that these goals will be achieved. In its attempt to balance these goals in this NPRM, however, the Commission has focused far too much on eliminating administrative burdens on cable operators, and not nearly enough on ensuring that rates for the basic service tier are

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3/ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

reasonable. The NPRM too often looks to ease the economic burden on cable system operators without acknowledging or addressing the need to reduce the economic burden on cable subscribers.

The Coalition addresses in these comments those areas of the NPRM of greatest concern to it. For example, the Commission proposes that, if a local franchising authority declines to seek to regulate a cable company, this Commission is without jurisdiction to regulate. Congress created no such regulatory gap -- to the contrary, it sought to close one. Similarly, the benchmark rate regulation scheme which the Commission has proposed is a "no lose" proposition for cable system operators, and a "must lose" proposition for consumers. The benchmark rate regulation proposal ensures that cable companies cannot lose money; what it does not ensure is what it must ensure -- that the rates for the basic service tier are and will be reasonable.4/

The foregoing are examples of the kinds of concerns expressed herein. The Coalition has had barely four weeks, including four Federal holidays, in which to review the NPRM and to prepare these comments. The diverse nature of the Coalition's membership has further complicated its ability

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4/ Communications Act of 1934, Section 623(b)(1), 47 U.S.C. Section 543(b)(1), as amended by the Cable Television Consumer Protection and Competition Act of 1992.

to prepare comprehensive comments. Finally, the Coalition's members do not possess the kinds of industry or company-specific data that is essential in order to evaluate many of the proposals set forth in the NPRM. The Coalition emphasizes, therefore, that these comments do not address all concerns raised by the NPRM, but rather address only those which the limited time and limited resources available to the Coalition have permitted.

I. THE SCOPE OF COMMISSION JURISDICTION OVER RATES FOR THE BASIC SERVICE TIER

A. The Commission Has Authority to Regulate Basic Cable Services Which Is Not Dependent Upon Its Rejection Or Revocation of A Franchising Authority's Certification.

The Commission has tentatively concluded that it has the power to regulate basic cable service rates only if it has first disallowed or revoked a "franchise authority's" certification.5/ In other words, in those instances in which a local "franchise authority"6/ has not sought certification, the rates for basic cable services will be unregulated, irrespective of whether there exists "effective

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5/ NPRM, p. 11.

6/ The term "franchise authority" as used in the NPRM is not defined. The Coalition assumes that the term is intended to have the same meaning as the term "franchising authority," which is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(9).

competition."7/ This interpretation, which is based on the Commission's reading of Section 623(a)(6), is contrary to the intent of Congress, will lead to substantial burdens on, and will produce substantial inefficiencies for, the Commission, cable operators and franchise authorities, and is contrary to the interests of consumers. Section 623(a)(6) is intended to close, not to open, a jurisdictional and regulatory gap.

The overriding purposes of the Act are to:

(1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;

(2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;

(3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;

(4) where cable systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and

(5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.8/

The driving motivation behind the re-regulation of the cable television industry was the dramatic escalation in the rates for cable services since de-regulation and the explicit

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7/ Cable Act, Section 623(c)(1)(1).

8/ Cable Act, Section 2(b).

recognition by Congress that, in most areas of the country, single cable operators dominate local markets, thus denying consumers the protection afforded by viable competition.9/ The Cable Act is a recognition of and response to the needs of consumers for effective protection against the abuses of local cable monopolies.

Against this backdrop, the Commission posits a jurisdictional gap in which a cable company will not be subject to any rate regulation for that service which Congress has found to be vested with the greatest public interest -- basic cable service.10/ The effect of such an interpretation will be to deny consumers in a substantial number of localities any effective protection against excessive basic cable service rates. Such a result is neither required nor permitted by the Cable Act.

The Commission is obligated to promulgate regulations which:

> ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.[11/]

9/ Cable Act, Section 2.

10/ Cable Act, Sections 2(10) and (11).

11/ Cable Act, Section 623(b)(1) (emphasis supplied).

Section 623(b)(1) is unequivocal in its mandate that any cable system that is not subject to effective competition must be subject to regulations which protect consumers from basic tier rates in excess of those that would be charged if the cable system were subject to effective competition. The jurisdictional gap which the Commission posits would eviscerate this statutory obligation by permitting cable systems not subject to effective competition to charge unregulated rates for the basic service tier unless and until the local franchise authority attempts to obtain certification.12/

In the current difficult economic times, many local communities, particularly small local communities, lack the economic wherewithal to regulate cable systems. The relative size of a community, its economic capability, and its location, however, do not make basic cable services any less important to its residents. The Cable Act embodies the Congressional determination that, in the absence of effective competition, the public interest requires regulation which ensures reasonable rates for local commercial and noncommercial educational television and public and governmental access programming.13/ Congress did not find that the public interest is somehow dependent

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12/ NPRM, p. 11.

13/ Cable Act, 623(b)(7).

upon the efforts of the local franchise authority to establish such regulation.

The Commission's interpretation stems from Section 623(a)(6), which provides, in relevant part, that:

> [i]f the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's certification under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3).

The Commission's tentative conclusion that "unless a local franchise authority seeks to assert regulatory jurisdiction over basic cable service, we would have no independent authority to initiate regulation of basic service rates"14/ is contrary to the Commission's explicit statutory obligations under Section 623(b)(1) to ensure that the rates for the basic service tier are reasonable and to protect subscribers of "any cable system" not subject to effective competition.

Section 623(b)(6) does not address the scope of Commission jurisdiction in the absence of an effort by a franchising authority to regulate. The section addresses only the situation in which the franchising authority has sought certification to regulate and that certification has

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14/ NPRM, pp.11-12.

been disapproved or revoked. The only interpretation of Section 623(a)(6) which is consistent with the Commission's statutory obligations is that the section was intended to close a regulatory gap which could be caused by Commission disapproval or revocation of certification.

The Cable Act establishes an explicit preference for local rather than Federal regulation of basic service tier rates.15/ The Commission may not interpose itself in the regulatory decisions of a local franchising authority, as long as those decisions are consistent with the Act and the Commission's regulations. If the Commission disapproves or revokes the local franchise authority's certification, there can be no local regulation of the cable system unless and until the local franchise authority obtains certification. Section 623(a)(6) was intended to close this regulatory gap by ensuring that, in such a case, the rates of the cable system would be subject to Commission regulation. The Commission will step in until, but only until, the local franchising authority obtains certification.

The legislative history of the Cable Act supports this interpretation. The House Report16/ contains a letter from the Congressional Budget Office providing an estimate of the cost of implementing the Cable Act. The budget

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15/ See Section 623(a)(1).

16/ House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. ("House Report").

estimate was predicated on the understanding that the legislation:

> would define effective competition within the cable television industry and would permit state or other franchising authorities to regulate cable television rates for systems where effective competition does not exist. Where franchising authorities decline to do so or fail to meet the specified standards, the bill would require the FCC to regulate rates. [17/]

The House Report conclusively demonstrates that, in evaluating the demands on the Federal budget of the reregulation of the cable industry, Congress understood that the FCC would regulate the rates for the basic service tier in two instances: (1) when the franchising authority declined to regulate, and (2) when the franchising authority's certification was disapproved or revoked.

The legislative history to which the Commission refers18/ in the NPRM is consistent with this interpretation. The statement that Section 623(a)(6) was intended to "specif[y] the scope of the FCC's authority to regulate in lieu of a franchising authority"19/ was intended to make clear the limits of the Commission's authority to regulate where a local franchising authority had attempted to assert jurisdiction. Neither Section

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17/ House Report, p. 75.

18/ NPRM, p. 11, n. 30.

19/ Id.

623(a)(6) nor the legislative history addresses the situation in which the local franchise authority has not sought to regulate. The Cable Act does not specifically prescribe the actions to be taken by the Commission in the absence of an attempt by the local franchise authority to assert jurisdiction, but the Act does explicitly establish the Commission's obligations with respect to rates for the basic service tier: the Commission must promulgate regulations to ensure that those rates are reasonable for all cable systems not subject to effective competition. Such regulations must, therefore, of necessity, provide for Commission regulation in the absence of regulation by the local franchise authority.

This interpretation of the Act is the only interpretation which is consistent with the goal of reducing administrative burdens on subscribers, cable operators, franchising authorities, and the Commission.20/ If the Commission's tentative interpretation were correct, local franchise authorities without the immediate wherewithal to assert jurisdiction and to regulate rates for the basic service tier could institute Commission regulation merely by filing for certification and having that certification disapproved. Such a statutory scheme would require countless local franchise authorities and cable systems to go through this pointless exercise, and the Commission to

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20/ Cable Act, Section 623(b)(2)(A).

expend its limited resources in evaluating such certifications (and cable system comments) and in issuing decisions disapproving certification. The net result of this exercise would be that the Commission would be required to assert jurisdiction. It is difficult to ascertain a rational reason for Congress to have adopted such a clumsy and wasteful procedure to ensure reasonable rates for the basic service tier. The far more reasonable interpretation is that Congress intended to take the direct approach.

B. The Commission Should Permit Local Franchising Authorities To Request That The Commission Assert Jurisdiction.

The Commission should permit, indeed encourage, local franchising authorities that do not intend to regulate to inform the Commission of this fact, and to request that the Commission assert jurisdiction.21/ Such notification and request would facilitate the Commission's exercise of its jurisdiction and better ensure that rates for the basic service tier are reasonable.22/ Of course, franchising

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21/ NPRM, p. 12, n. 32.

22/ In keeping with this concern that the FCC adopt procedures that will ensure that its actions are coordinated as closely as possible with franchising authorities which are eligible to seek certification under the Cable Act, the Coalition notes that it very strongly supports the Commission's proposal that, with regard to the threshold determination of the absence of effective competition which is required for franchising authority certification, the Commission will:

(continued...)

authorities could at some later date, opt to regulate cable operators by following the certification procedures established in this NPRM.

II. THE COMMISSION'S AUTHORITY WITH RESPECT TO EXCESSIVE RATES FOR THE BASIC SERVICE TIER.

A. Congress Intended To Protect Subscribers From Current and Future Excessive Rates.

The principal reasons for re-regulation of the cable industry were the dramatic rise in cable service rates following deregulation, the absence of viable cable alternatives for subscribers in many areas of the country, and increasing concentration in the cable industry.23/ The rate of increase in the rates for cable services far outstripped increases in costs while at the same time it became increasingly clear that, in many areas of the country, there was no effective competition to discipline the rate demands of cable systems. At the same time, it was apparent that there was little likelihood that these trends would not continue in the future. Although it may not be possible to say that Congress determined that the current rates of all cable systems are excessive and that, absent

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22/(...continued)

> base [its] independent findings initially on the determination by the franchising authority that effective competition does not exist. [NPRM, p. 12 (emphasis supplied).]

23/ Cable Act, Sections 2(a)(1)-(4).

regulation, all future rates will be excessive, Congress believed that current rates generally were excessive and that it is likely that future rates also will be excessive in the absence of effective regulation.

The legislative history supports the conclusion that Congress intended to protect consumers from existing as well as future excessive rates.

The House Committee was:

> concerned . . . that some cable operators have abused their deregulated status and have unreasonably raised the rates they charge consumers. Section 3 [of the Cable Act] is designed to protect consumers from unreasonable cable rates.[24/]

The House Committee specifically found, with respect to cable programming services, that:

> a minority of cable operators have abused their deregulated status and have unreasonably raised subscribers' rates. In some cases brought to the Committee's attention, those rate increases have been egregious. In order to protect consumers, it is necessary for Congress to establish a means for the FCC, in individual cases, to identify unreasonable rates and to prevent them from being imposed upon consumers. [25/]

The Commission's obligations under Section 623(b)(1) require that it institute a regulatory scheme which ensures that rates for the basic service tier are reasonable. The

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24/ House Report, p. 79.

25/ House Report, p. 86.

section does not limit its reach to future rates, rather it extends by its terms to all rates, current and future. The Commission is, therefore, obligated to establish a regulatory scheme which provides a means for reducing existing excessive rates and for preventing future excessive rates.

The Commission has inquired whether Congress intended that "our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted . . . ."26/ The Coalition suggests that the FCC is asking the wrong question. The relevant question is whether the Congress anticipated that, given its detailed findings regarding the unreasonableness of rates in non-competitive areas, the Commission would adopt a scheme to ensure that existing rates are reasonable. The Coalition believes the unequivocal answer to this question is yes, which means that the very strong likelihood is that rules which accomplish that result will "produce rates generally lower than those in effect when the Cable Act of 1992 was enacted...." The Coalition believes it is clear that Congress intended that all current rates be subject to review and mandatory reduction if they are found to be excessive, and that future rates be regulated to ensure that rates for the basic service tier are reasonable.

26/ NPRM, p. 5.

B. The Commission Should Promulgate Regulations Which Establish Procedures By Which Franchising Authorities May Review Existing And Future Rates And Order Refunds.

The Commission has proposed possible procedures by which the current rates of cable companies may be reviewed and, where appropriate, reduced.27/ The Commission suggests a procedure under which: (1) current rates for the basic service tier would have to be filed within a set number of days following the certification of the local franchising authority; (2) the franchising authority would have a specified period of time in which to review the current rates (e.g., 120 days); and (3) at the end of the time period, the rates would be presumed reasonable in the absence of a negative finding by the franchising authority. With minor modifications discussed below, the Coalition believes that the procedures which the Commission has outlined are reasonable.

The Coalition believes that, with the exception of the mechanism by which regulatory review is initiated, the procedures for review of current rates and proposed rate changes should be the same.

1. Procedures with respect to Current Rates.

As discussed in Section III, infra., although the Coalition strongly objects to the Commission's proposal for benchmark ratemaking, the Coalition does believe that a

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27/ NPRM, p. 42.

cost-based benchmark rate scheme which embodies the principles set forth in Section III may be appropriate. If the Commission adopts a benchmark rate proposal with appropriate safeguards, like the one proposed by the Coalition, franchising authority evaluation and action with respect to current rates should be as follows:

- within thirty days of the issuance of notice that the franchising authority has received its certification, the cable system must file with the franchising authority (1) its current rates, (2) all data and other information required by the Commission's regulations, in the format specified by those regulations (see Section III.B.3, infra), and (3) any additional information that the cable company believes justifies its current rates.In any proceeding involving the unreasonableness of the cable company's rates, the cable company would have the burden of proof to justify the reasonableness of its current or proposed rates. Placing the clear burden of proof on the cable company is particularly appropriate if the period for review of the rates is to be short, as the cable company typically is in